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Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., ADMINISTRATOR OF THE ESTATE OF [redacted] McGEE, PETITIONER,

versus

EDMUND A. COLE, RESPONDENT

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

HENRY HAMMER,
Columbia, South Carolina,

HENRY H. EDENS,
Columbia, South Carolina,
Attorneys for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., ADMINISTRATOR OF THE ESTATE OF L. T. McGEE, PETITIONER,

versus

EDMUND V. COLE, RESPONDENT

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

(A). MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on April 20, 1964. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the decision of this Court in *Mercer v. Theriot*, decided May 4, 1964, and reported in 84 S. Ct. 1157, is in direct conflict with that of the Court of Appeals for the Fourth Cir-

cuit in this case; and although comparable in all material respects to the case at bar, it reaches an exactly opposite result. This petition for rehearing is filed after the expiration of the time prescribed in Rule 58. It is therefore based upon the ground that the new and controlling decision of this Court in *Mercer v. Theriot, supra*, was decided subsequent to the denial of the petition for certiorari in this case and did not come to the attention of petitioner or his counsel until it was reported in the May 15, 1964, issue of West Publishing Company's Supreme Court Reporter which did not reach petitioner or his counsel until May 26, 1964. Under the circumstances, this Court clearly has power, in its discretion, to entertain the petition. *Zap v. United States*, 330 U. S. 800; *Land v. Dollar*, 343 U. S. 973, 341 U. S. 737.

HENRY HAMMER,
HENRY H. EDENS,
Attorneys for Petitioner.

May 28, 1964.

(B). PETITION FOR REHEARING

Petitioner prays that this Court grant a rehearing of its order of April 20, 1964, and that a writ of certiorari issue to reverse the judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed March 7, 1964, herein.

On May 4, 1964, this Court rendered a decision in *Mercer v. Theriot*, 84 S. Ct. 1157, in which the facts are comparable in all material respects to those in the present case. It will be noted that both cases are wrongful death actions involving "hit and run" drivers, that the body of deceased in each case was found on the portion of the highway where it was negligent for the vehicles to be driven thereon, that tire marks in each case were near the body,

that each of the vehicles bore marks of a recent blow, and particles found on each car evidenced the involvement of the vehicles in striking down pedestrians.

It is thus evident that the facts in *Mercer v. Theriot, supra*, are comparable to those in the present case, and even though there are additional facts in the present case which are more compelling and cogent in establishing liability, an exactly opposite result was reached by the Court of Appeals for the Fourth Circuit in the instant case. This Court, in reversing the Court of Appeals for the Fifth Circuit in *Mercer v. Theriot, supra*, expressly recognized that evidence of the nature adduced in both cases was sufficient to sustain a verdict against a "hit and run" driver. It said:

> "The evidence was sufficient under any standard which might be appropriate—state or federal. See *Dick v. New York Life Insurance Co.*, 359 U. S. 431, 444-445; 79 S. Ct. 921, 925-926, 3 L. Ed. (2d) 895."

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

HENRY HAMMER,
HENRY H. EDENS,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, we hereby certify that the foregoing petition for rehearing and the accompanying motion for leave to file are presented in good faith and not for delay, and are restricted to the grounds specified in paragraph 2 of Rule 58.

HENRY HAMMER,
HENRY H. EDENS,
Attorneys for Petitioner.